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No. 86-1263

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1986

CHARLES MICHAEL HENRICH,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

WHETHER THE PETITIONER'S RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS WERE VIOLATED BY THE ADMISSION AT HIS TRIAL OF INCRIMINATING STATEMENTS MADE BY THE PETITIONER TO A CO-DEFENDANT, WHO WAS AN UNDISCLOSED PROSECUTION INFORMANT, AFTER A COMPLAINT HAD BEEN FILED AND AFTER THE PROSECUTOR WAS AWARE THAT THE PETITIONER WAS REPRESENTED BY COUNSEL.

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RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, respondent[1] herein, by and through the Attorney General of Texas, and files this Brief in Opposition.

OPINION BELOW

The opinion of the Fifth Texas Court of Appeals affirming Henrich's conviction is attached to the petition as Appendix C.

1. For clarity, respondent in this Court, the State of Texas, will be referred to as "the state." Petitioner, Charles Michael Henrich, will be referred to as "Henrich."

JURISDICTION

Henrich seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Henrich bases his claims on the sixth and fourteenth amendments to the United States Constitution.

STATEMENT OF THE CASE

A. Course of Proceedings

Henrich was indicted for the felony offense of theft of property of the value of $10,000 or more. He pled not guilty and was tried by a jury, which on May 27, 1982, found him guilty and assessed punishment of imprisonment for five years and a fine of $10,000.

Henrich appealed to the Fifth Court of Appeals of Texas, which reversed the conviction on the ground that the admission in evidence of tape recorded statements violated state law (Appendix A to Petition). The state then filed a petition for discretionary review, which was granted by the Texas Court of Criminal Appeals. That court reversed the judgment of the court of appeals and remanded the case for consideration of Henrich's other grounds (Appendix B). On remand, the court of appeals affirmed the conviction (Appendix C) and subsequently denied Henrich's motion for rehearing. Henrich then filed a petition for discretionary review, which the Court of Criminal Appeals denied.

B. Statements of Facts

The state is in substantial agreement with Henrich's statement of the events which gave rise to his constitutional claim. As discussed below at 3-6, the state does not agree with Henrich's assertion that the question presented was properly raised in or decided by the court below.

SUMMARY OF ARGUMENT

There are no special and important reasons to consider the question presented.

This Court lacks jurisdiction to consider the question presented because it was not properly raised in or decided by the court below.

REASONS FOR DENYING THE WRIT

I.

THE QUESTION PRESENTED FOR REVIEW IS UNWORTHY OF THIS COURT'S ATTENTION.

Rule 17 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Henrich has advanced no special or important reason in this case, and none exists.

II.

THIS COURT IS WITHOUT JURISDICTION TO CONSIDER HENRICH'S CLAIM BECAUSE IT WAS NOT PROPERLY RAISED IN OR DECIDED BY THE COURT BELOW.

The cases are legion that this Court will not decide issues raised for the first time on petition for certiorari or on appeal, and that the Court will not decide federal questions not raised and decided in the court below. *E.g., Heath v. Alabama*, ____U.S.____, 106 S.Ct. 433, 436-37 (1985); *Illinois v. Gates*, 462 U.S. 213, 218-222 (1983); *Tacon v. Arizona*, 410 U.S. 351, 352 (1973); *Hill v. California*, 401 U.S. 797, 805-06 (1971); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). In articulating this requirement, the Court has stressed the long-standing nature of the rule: "[I]n *Crowell v. Randell*, 10 Pet. 368 (1836), Justice Story reviewed the earlier cases commencing with *Owings v. Norwood's Lessee*, 5 Cranch 344 (1809), and came to the conclusion that the Judiciary Act of 1789, 20 § 25, 1 Stat.

85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.' 10 Pet. 368, 391." *Cardinale v. Louisiana*, 394 U.S. at 439. To properly invoke the jurisdiction of the Court, it is crucial that the federal question not only be raised in the prior proceedings, but that it be raised at the proper point. *Beck v. Washington*, 369 U.S. 541, 550 (1962); *Godchaux Co., Inc. v. Estopinal*, 251 U.S. 179, 181 (1919).

In the instant case, Henrich filed a pretrial motion seeking to suppress his statements to Lowe (Tr. 51). The motion listed six grounds for suppression, the first five of which were based on federal and state constitutional provisions proscribing unlawful searches and seizures. The sixth ground was that Henrich "was not given his Miranda warnings prior to speaking on the telephone" (*Id.*). Thus, this motion arguably raised the question presented herein. On appeal, however, Henrich raised only the following grounds:

1. The trial court committed reversible error in denying the appellant's motion to suppress the tape recordings for the reason that the tapes were obtained in violation of state law.

2. The trial court committed reversible error in denying the appellant's motion to suppress the evidence obtained from the appellant's briefcase for the reason that such evidence was obtained during an illegal search.

3. The trial court committed reversible error in overruling the appellant's best evidence objection to Walter Lowe's testimony concerning the tape recorded conversations.

Henrich's brief in the state court of appeals did not cite *Massiah v. United States*, 377 U.S. 201 (1964); the only citation of *Massiah* was in the state's brief. The ground of error attacking admission of the tape recordings was based solely on state law.

The court of appeals reversed the conviction, solely on the basis of the state law provisions relied on by Henrich. The state then sought, and obtained, discretionary review by the Texas Court of Criminal Appeals, which reversed the judgment of the court of appeals, again strictly on state law grounds. In the Court of Criminal Appeals, as in the court of appeals, the only citation of *Massiah* was in the state's brief. Henrich misrepresents the record in asserting that the issue was raised at pages 6-8 of his brief in the Court of Criminal Appeals (Petition at 4 n.2). Nowhere in that brief did Henrich raise the federal constitutional issue presented herein; Henrich's brief in the Court of Criminal Appeals was devoted solely to the state law issues which formed the basis of the decisions of both state appellate courts.

After the case was remanded to the intermediate state appellate court for consideration of the other issues raised by Henrich, that court affirmed the conviction without further briefing by Henrich or the state. Henrich then filed a motion for rehearing in which he reurged, *verbatim*, the first point raised in his original brief. Although this ground challenged the admission in evidence of the tape recorded statements, the body of the motion for rehearing consisted of argument challenging the admission of evidence seized in a search of Henrich's briefcase. In any event, the motion for rehearing did not in any way raise the federal constitutional claim presented to this Court.

After the court of appeals denied rehearing, Henrich filed a petition for discretionary review in the Court of Criminal Appeals in which he raised only one issue: the validity of the search of his briefcase. Thereafter, Henrich filed a supplemental brief in which he raised the following issue:

> The actions of the district attorney in having witness Walter Lowe tape record conversations with the Appellant violated Appellant's rights sixth Amendment right to counsel.

Henrich's supplemental brief did not cite *Massiah* but did rely on *Maine v. Moulton*, 474 U.S. ____, 106 S.Ct. 477 (1985).

Henrich seeks review by this Court of the decision of the Fifth

Court of Appeals of Texas. The question presented was not raised in or considered by that court; instead, it was raised, belatedly, only in Henrich's supplemental brief in the Court of Criminal Appeals. Because the issue was not presented to or decided by the court below, this Court lacks jurisdiction to consider it. *Beck v. Washington; Cardinale v. Louisiana.*

CONCLUSION

For these reasons, the state respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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